

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE )  
WASTE ACTION PROJECT; )  
WASHINGTON PUBLIC EMPLOYEES )  
FOR ENVIRONMENTAL )  
RESPONSIBILITY; RESOURCES FOR )  
SUSTAINABLE COMMUNITIES; and )  
CITIZENS FOR A HEALTHY BAY, )

Appellants, )

v. )

STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )

Respondent, )

And )

ASSOCIATION OF WASHINGTON )  
BUSINESS and WASHINGTON STATE, )  
DEPARTMENT OF )  
TRANSPORTATION, )

Intervenors. )  
\_\_\_\_\_ )

PCHB NO. 00-173  
(Construction Stormwater Permit)

ORDER ON AWB'S  
MOTION TO STRIKE

The Association of Washington Business (AWB) has moved to strike two items from the record before the Board on the appellants' Motion for Summary Judgment:

- (1) Exhibit N to the Richard Smith affidavit consisting of a series of e-mail messages received by then Ecology employee Tom Luster.
- (2) The deposition of Tom Luster.

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Each of the evidentiary challenges will be addressed separately.

1. E-mail Records.

The materials presented to the Board show that Exhibit N is comprised of e-mail messages Ecology employee Tom Luster either sent to or received from other Ecology employees in the ordinary course of his employment with the Department. The e-mails were drafted by Ecology personnel in the performance of their official job duties. The e-mail messages are public records of the state and contain information recorded at the time the communication was prepared.

Under the circumstances of this case, the e-mail messages can be properly considered as business records under RCW 5.45.020. As such, they are admissible and the motion to strike will be denied. The arguments raised by AWB challenging the relevance of this material and suggesting prejudice from its introduction will be given consideration in determining the proper weight, if any, to be given the evidence.

2. Luster Deposition.

AWB has also objected to the introduction of the Tom Luster deposition in support of the appellants' motion for summary judgment. CR 56(e) allows affidavits to be supplemented by depositions. The deposition must meet the requirements for a proper affidavit including that the affiant has personal knowledge of the matter, that the facts set forth would be admissible in evidence and that the content show the witness is competent to testify to the matters stated.

In this case the Tom Luster deposition demonstrates that the witness had personal knowledge of the matters about which he testified. The subject matter of the testimony was related to the controversy and, in general, would be admissible in evidence. There was also a showing that the witness is competent to testify about the basic subject matter covered during the deposition. As a result, the deposition as a whole is not objectionable.

AWB has the right to object to portions of the deposition that do not meet the governing standards for an affidavit in support of summary judgment. The only specific testimony challenged in the motion before the Board relates to comments Mr. Luster made about a reasonable potential analysis performed by Lisa Austin. Mr. Luster does not purport to have any expertise about this type of study or this particular study. To the extent his deposition testimony is being offered to prove the truth of the matters contained in this study or to give an opinion about the validity of the study, it is objectionable and should be stricken.

As the parties are aware, the Board is not strictly bound by the rules of evidence in its proceedings. The Board's rules allow a broader range of evidence: "Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." WAC 371-08-500(1).

The e-mail messages authored by Ecology employees in the ordinary course of their job duties have the type of reliability that supports inclusion in the record. The deposition in question also has a high degree of reliability. It was taken as sworn testimony in the presence of counsel in the case. The witness was subject to cross-examination and was testifying from

personal knowledge. While particular answers may be objectionable, the deposition as a whole is the type of material that reasonable persons could rely upon in the conduct of their affairs. Whether the information contained in either of the challenged exhibits is particularly persuasive on the ultimate issues in the case is an entirely different inquiry than whether it is reliable.

Based upon the foregoing analysis, the AWB Motion to Strike Exhibit N. to the Smith affidavit and the Tom Luster deposition is denied, with the exception that of any material in the Luster deposition going to the issue of the validity or substance of the Lisa Austin study is STRICKEN.

DONE this \_\_\_\_\_ day of \_\_\_\_\_ 2001.

POLLUTION CONTROL HEARINGS BOARD

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Phyllis K. Macleod  
Administrative Appeals Judge, Presiding